STATE OF MICHIGAN

IN THE SUPREME COURT

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Appeal from the Court of Appeals
Jessica R. Cooper, P.J., and Richard A. Bandstra and Michael J. Talbot, JJ.

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

-v-

NICHOLAS HOLTSCHLAG,

Defendant-Appellee.
_____/

Supreme Court No. 123553

Court of Appeals No. 226715

Lower Court No. 99-4731-03

WAYNE COUNTY PROSECUTOR
Attorney for Plaintiff-Appellant

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DAVID R. CRIPPS (P34972)
Attorney for Defendant-Appellee Holtschlag

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# BRIEF ON APPEAL -- DEFENDANT-APPELLEE

# * * ORAL ARGUMENT REQUESTED * *

# PROOF OF SERVICE

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## STATEMENT OF QUESTION PRESENTED

**DID THE COURT OF APPEALS PROPERLY RULE THAT SINCE THE DEFENDANT WAS CHARGED WITH INVOLUNTARY MANSLAUGHTER UNDER THE THEORY OF "GROSS NEGLIGENCE", HE COULD NOT BE CONVICTED OF SUCH A CRIME DUE TO THE FACT THAT THE PROSECUTOR ALLEGED THAT THE DEATH RESULTED FROM AN UNLAWFUL ACT LABELED AS A FELONY, IN VIOLATION OF THIS COURT'S HOLDINGS IN *People v Datema*, 448 Mich 585 (1995); *People v Heflin*, 434 Mich 482 (1990); *People v Beach*, 429 Mich 450 (1988); *People v Ryczek*, 224 Mich 106 (1923)?**

The trial court answered, "No".
The prosecutor answered, "No".
The Court of Appeals answered, "Yes".
Defendant-Appellee answers, "Yes".

## COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

Following a jury trial, Defendant Nicholas Holtschlag was convicted of Involuntary Manslaughter, MCL 750.321; and two counts of Mixing a Harmful Substance in a Drink, MCL 750.436(1). He was sentenced to terms of 5 years 9 months to 15 years' imprisonment for the Involuntary Manslaughter conviction and 2 ½ to 5 years' imprisonment for the Mixing a Harmful Substance in a Drink conviction.

From these convictions and sentences, Defendant Holtschlag appealed as of right. In an Unpublished *per curiam* Opinion under Docket No. 226715, dated March 27, 2003, the Court of Appeals rejected the most of the issues raised in the Defendant's appeal of right; however, they did vacate the manslaughter conviction on the basis of legally insufficient evidence to support the conviction (Slip Op at 6-7 [19a-20a] ).

The prosecutor filed an application for leave to appeal, along with a motion for expedited consideration with this Court. On July 3, 2003, this Court granted both the motion for immediate consideration and the application for leave to appeal (Order of this Court, 7/3/03, Docket No.123553 [8a] ). Further facts will appear during the course of argument below.

## ARGUMENT

**THE COURT OF APPEALS PROPERLY RULED THAT SINCE THE DEFENDANT WAS CHARGED WITH INVOLUNTARY MANSLAUGHTER UNDER THE THEORY OF "GROSS NEGLIGENCE", HE COULD NOT BE CONVICTED OF SUCH A CRIME DUE TO THE FACT THAT THE PROSECUTOR ALLEGED THAT THE DEATH RESULTED FROM AN UNLAWFUL ACT LABELED AS A FELONY, IN VIOLATION OF THIS COURT'S HOLDINGS IN *People v Datema*, 448 Mich 585 (1995); *People v Heflin*, 434 Mich 482 (1990); *People v Beach*, 429 Mich 450 (1988); *People v Ryczek*, 224 Mich 106 (1923).**

In a criminal prosecution, due process requires proof beyond a reasonable doubt as to each element of the alleged crime. US Const, Am XIV; Const 1963, art 1, § 17; *In re Winship*, 297 US 358; 90 S Ct 1068; 25 Ed 2d 368 (1970). If the prosecution fails to present sufficient evidence of the accused's guilt, a judgment of acquittal must be entered. *People v Hampton*, 407 Mich 354 (1979), *cert den* 449 US 885 (1980); *Jackson v Virginia*, 443 US 307; 99 SCt 2781; 61 L Ed 2d 560 (1979).

The crime of Manslaughter has been recognized as an unintentional killing. *People v Scott*, 29 Mich App 549, 551 (1971). The specific crime of "involuntary manslaughter" involves an unintentional killing resulting from the commission of an unlawful act not amounting to a felony, or from gross negligence. *Metropolitan Life Ins. Co. v McDavid*, 39 F Supp 228 (ED Mich, 1941). This Court has routinely defined the crime of "involuntary manslaughter" as the killing of another without malice and unintentionally; (1) ***but in doing some unlawful act not amounting to felony*** nor naturally tending to cause death or great bodily harm, or (2) ***in negligently doing some act lawful in itself***, or (3) ***in negligently omitting to perform legal duty***. *People v Datema*, 448 Mich 585,

596-597 (1995); *People v Heflin*, 434 Mich 482, 507-508 (1990); *People v Beach*, 429 Mich 450, 477 (1988); *People v Ryczek*, 224 Mich 106 (1923); *People v O'Leary*, 6 Mich App 115 (1967).

The jury convicted Defendant Holtschlag, and the co-defendants, under the "gross negligence" theory of involuntary manslaughter. However, the death in this case resulted from defendants' alleged unlawful placement, or aiding and abetting in the placement, of a poison/harmful substance in a drink, an unlawful act that is labeled a felony under MCL 750.436 (1). Therefore, the ***unlawful act*** alleged was a ***felony***; which legally precludes an involuntary manslaughter conviction under the misdemeanor-manslaughter rule.[1]

The ruling of the Court of Appeals clearly demonstrates that the majority was concerned that the Defendants were improperly convicted on the facts as they were presented at the trial. Considering the importance of due process to a defendant at trial, it is imperative that the conviction be legally proper. This concern is put forth by the following holding of the Court of Appeals as the basis for reversal of the involuntary manslaughter conviction:

> As noted by the prosecution, the trial court in the instant case instructed, and the jury convicted, defendants Cole, Holtschlag, and Brayman under the gross negligence theory of involuntary manslaughter. However, the death in this case resulted from defendants' unlawful placement, or aiding and abetting in the placement, of a poison/harmful substance in a drink that they knew was likely to be ingested. Mingling a poison/harmful substance in a person's drink is clearly an act unlawful in itself and is in fact labeled a ***felony*** under MCL 750.436(1). Because mingling a harmful substance is an unlawful act, defendants could not be convicted of involuntary manslaughter under a theory of gross negligence. See

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1 The misdemeanor manslaughter rule provides that, if death occurs as result of an unlawful act, ***not amounting to felony*** or naturally tending to cause death or serious injury, the person who committed unlawful act is guilty of involuntary manslaughter. *Datema, supra* at 588 n.1.

> *Datema, supra* at 596-597; *People v Beach*, 429 Mich 450, 477; 418 NW2d 861 (1988).
>
> Moreover, because defendants Cole, Holtschlag, and Brayman were convicted of felonies, it would be impossible, as a matter of law, to find them guilty under the misdemeanor-manslaughter rule. While the prosecution argues that it is not required to prove negative elements of a crime, it fails to admit that it provided affirmative evidence that a felony was committed. Accordingly, we find that that there was legally insufficient evidence to convict defendants Cole, Holtschlag, and Brayman of involuntary manslaughter.

(Slip Op at 6-7 [19a-20a] )(footnote omitted)(emphasis in original).

Contrary to the prosecutor's argument to the contrary, the Court of Appeals' holding is entirely consistent with this Court's holding in *Datema* and its progeny. In *Datema*, this Court held that a person who commits an assault and battery and causes unintended death may be convicted of common-law involuntary manslaughter under the "misdemeanor-manslaughter" rule:

> We conclude that if an assault and battery is committed with a specific intent to inflict injury and causes unintended death, the actor may be found guilty of (at least) involuntary manslaughter.

*Datema, supra* at 608.

In addition, this Court re-affirmed the common-law definition of involuntary manslaughter:

> ". . . the killing of another without malice and unintentionally, but in doing some unlawful act not amounting to a felony nor naturally tending to cause death or great bodily harm, or in negligently doing some act lawful in itself, or by the negligent omission to perform a legal duty."

*Datema, supra* at 595-596, quoting from *Ryczek, supra* at110.

In *Datema*, the defendant, during an argument, slapped his intoxicated wife, inflicting a blow, which, in the medical examiner's opinion "would have to be with probably all the force that one could muster". *Datema, supra* at 591. Because of her condition, the defendant's wife did not stiffen her neck

in response to the blow. As a result, the defendant's blow tore an artery in his wife's head, causing her death. This Court found the defendant's conduct culpable under the misdemeanor-manslaughter rule:

> Pursuant to the definition of involuntary manslaughter set forth in *Ryczek*, defendant's conduct in this case would fulfill the common-law misdemeanor-manslaughter theory of liability: the crime of battery is not a felony, and as defined at common law, it was not an inherently dangerous offense.

*Datema, supra* at 600.

Applying the above principles to the present case, the Court of Appeals' decision to vacate the involuntary manslaughter conviction was, in fact, the only appropriate conclusion to be drawn under the law. The evidence here never supported a finding that Defendant intended and committed acts amounting to a misdemeanor on the victim; consequently, the resulting death could not have been involuntary manslaughter. As stated previously, the death resulted from the defendants' unlawful placement, or aiding and abetting in the placement, of a harmful substance in a drink that they knew was likely to be ingested. Under MCL 750.436 (1), as it existed at the time of the trial,[2] this statute defined the crime as a felony, and since the penalty is "for not more than one year," it is a felony, and not a misdemeanor, for all purposes, under MCL 761.1(g) & (h).[3]

While it appears that the prosecutor is unhappy with the holding of the Court of Appeals, this does not change the fact that the Court of Appeals was merely following the law of Michigan when it rendered its opinion in this case. While the prosecutor notes that one of the panel members of the

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2 The statute has been subsequently amended by 2002 PA 135.

3 Which defines a felony as an offense punishable "for more than 1 year," and a misdemeanor as an offense that is not a felony or a violation of an order, rule or regulation of a state agency, etc.

Court of Appeals apparently stated at oral argument that second degree murder would have been the appropriate charge, and this Court recently held in *People v Mendoza*, 468 Mich 527 (2003) that both forms of manslaughter are inferior offenses of murder, within the meaning of the statute governing inferior-offense instructions;[4] this does not mean that involuntary manslaughter would have been legally supported. In *Mendoza*, this Court held that when a defendant is charged with murder, an instruction for voluntary and involuntary manslaughter must be given ***only if supported by a rational view of the evidence***:

> Thus, we conclude that the elements of involuntary manslaughter are included in the offense of murder because involuntary manslaughter's *mens rea* is included in murder's greater *mens rea*. Accordingly, we hold the elements of voluntary and involuntary manslaughter are included in the elements of murder. Thus, both forms of manslaughter are necessarily included lesser offenses of murder. Because voluntary and involuntary manslaughter are necessarily included lesser offenses, they are also "inferior" offenses within the scope of MCL § 768.32. Consequently, when a defendant is charged with murder, an instruction for voluntary and involuntary manslaughter must be given if supported by a rational view of the evidence.

*Mendoza, supra* at 541-542.

Again, as stated previously, the death in this case allegedly resulted from an unlawful placement of a harmful substance in a drink that was likely known to be ingested, an act unlawful in itself that is labeled a ***felony*** under MCL 750.436(1). Because mingling a harmful substance is an ***unlawful felonious*** act, Defendant Holtschlag could not be convicted of involuntary manslaughter under a theory of gross negligence, or under the misdemeanor-manslaughter rule. Therefore, even if the prosecutor had charged the defendants with second degree murder in this case, the Court would

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[4] (People's Brief, p 18).

have been legally precluded from giving an instruction for involuntary manslaughter, as it would have been legally impossible to support such a charge by a rational view of the evidence. *Mendoza, supra.*

To the extent the prosecutor appears to want this Court to abolish the misdemeanor-manslaughter rule, it should be noted that in *Datema*, this Court specifically rejected an argument that the misdemeanor-manslaughter rule should be abandoned. *Datema, supra* at 588.

For all of the foregoing reasons, this Court should affirm the Court of Appeals' Opinion which vacates Defendant Holtschlag's conviction and sentence for involuntary manslaughter.

## SUMMARY AND RELIEF

**WHEREFORE**, for the foregoing reasons, Defendant-Appellant asks that this Honorable Court to affirm the Court of Appeals' Opinion which vacates his conviction and sentence for involuntary manslaughter.

Respectfully submitted,

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Dated: 10/22/03

**STATE OF MICHIGAN**

**IN THE SUPREME COURT**

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**Jessica R. Cooper, P.J., and Richard A. Bandstra and Michael J. Talbot, JJ.**

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**Defendant-Appellee.**
_____/

**PROOF OF SERVICE**

STATE OF MICHIGAN )
) ss.
COUNTY OF WAYNE )

DAVID R. CRIPPS, being first duly sworn, deposes and says that on October 22 2003, he did serve a copy of Defendant-Appellee's Brief on Appeal, and this Proof of Service upon:

OLGA AGNELLO (P32703)
Frank Murphy Hall of Justice
1441 St. Antoine - 12th Floor
Detroit, Michigan 48226

by enclosing the same in a properly addressed envelope, with first-class postage affixed thereon, and depositing said envelope in a United States Mail receptacle.

DAVID R. CRIPPS

Subscribed and sworn to before me
this 22nd day of October 2003.

Margaret L. Cavanaugh
Notary Public

MARGARET L. CAVANAUGH
Notary Public, Macomb County, MI
My Commission Expires Aug. 1, 2008